APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

In re the marriage of Barbara Lee and Sidney Hersh Yateman	
BARBARA LEE YATEMAN, Plaintiff and Respondent, v. SIDNEY HERSH YATEMAN, Respondent and Appellant.	1 Civil 49751 (Super. Ct. No. MDR 10439)

Former husband, Sidney Hersh Yateman, appeals from the order denying his motions to set aside a portion of the interlocutory and final decrees of dissolution of marriage in which his military retirement benefits were determined to be community property to the extent they were attributable to

appellant's military service during marriage and to modify spousal support.

There have been extensive court proceedings in connection with the dissolution. We set forth the facts only insofar as they are pertinent to the issues on this appeal. The parties were married in 1959 and separated in 1978. Former wife, Barbara Lee Yateman, respondent herein, filed her petition for dissolution on March 13, 1978. In Sidney's response, he noted the "[p]otential partial community interest in [his] military retirement." On August 24, 1978, the parties stipulated in open court that the court would retain jurisdiction over Sidney's military retirement. The interlocutory judgment of dissolution of marriage was entered November 15, 1978 and provides, inter alia: "8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for

the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon death of either party or remarriage of petitioner.

". . . . . .

"10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring [sic] sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences."

On January 12, 1979, Sidney filed notice of appeal from the portions of the interlocutory judgment of dissolution of marriage which dealt with child support for daughter Jill, spousal support (see ¶ 8, supra), and the appraisal and division of property in his possession. No appeal was taken with respect to Sidney's military retirement. The appeal pertaining to the property was apparently not pursued. Final judgment of dissolution of marriage was entered June 13, 1979. On November 29, 1979, this court filed its opinion in 1 Civil 46564 holding that the trial court did not abuse its discretion in its award of child and spousal support.

On December 12, 1979, Sidney filed his notice of motion to modify spousal support, and a notice of motion "to set aside that portion of interlocutory and final decrees in which jurisdiction was retained over military retirement benefits by characterizing them as community property."

Hearing on the motions was held on January 31, 1980, and the matters submitted. On February 1, 1980, a minute order was filed which states:

"1. Respondent's motion to set aside that portion of the Judgment finding a community interest in Respondent's military retired pay and reserving jurisdiction to determine the amount payable upon vesting, is denied for two reasons:

"a) It is still the law in California that a community interest in military retired pay may be acquired during marriage.

"b) The evidence is insufficient to support a finding of entitlement to relief pursuant to Code of Civil Procedure Section 473.

"2. Respondent's motion to modify the order granting Petitioner spousal support of $550.00 per month is granted for the following reasons:

"There has been a change in

circumstances since the Order of August 23, 1978.

"Petitioner is employed earning $800.00 a month gross whereas she was not employed at the time of the Order. This income coupled with $300.00 a month interest income received since the Order of 1978, results in net monthly income after taxes of approximately $775.00.

"Since the original Order, Petitioner has assumed custody of the older daughter Jennifer who will attain majority in a month. Jennifer will not graduate from high school until June 1980. She is partly, but not totally, self-supporting. Petitioner will reasonably undertake to assist Jennifer financially at least thru June 1980.

"Respondent's income has increased $400.00 a month gross since 1978, and probably $200.00 net, after taxes.

"Petitioner's present income, including her net (after tax) spousal support, is judged sufficient to meet the expenses of

herself and the two children. It is noted that Petitioner's rent is $600.00 a month.

"The Court questions the reasonableness of Respondent's complaint of indigency, particularly with his substantial law school tuition expense.

"Nevertheless, it is concluded that some modification is reasonable.

"It is ordered that effective July 1, 1980 spousal support will be reduced to the sum of $400.00 per month. The Order of August 23, 1978 remains in effect in all other respects.

"Each party will bear his and her own attorney fees and costs."

On February 11, 1980, Sidney filed his "application to reconsider and modify prior order and request for further hearing thereon" pursuant to Code of Civil Procedure section 1008. On February 13, 1980, Sidney's motion for reconsideration was denied. On March 17, 1980 Sidney filed notice of appeal from the minute order filed

February 1, 1980.

Before this court, Sidney contends (1) that the trial court erred in subjecting his military retirement to the state community property scheme, and (2) that "the trial court abused its discretion in failing to terminate or further reduce spousal support below the sum of $400.00 per month."

We first address Sidney's military retirement. Initially he contends that Code of Civil Procedure section 473 is the appropriate vehicle "for a 'direct attack' on that portion of the judgment that deals with characterizing [his] military retirement benefits as community property and therefore subject to division."[1/] In the instant case, Sidney failed to appeal

1. Code of Civil Procedure section 473 provides in pertinent part: "The court may, upon such terms as may be just, relieve a party . . . from a judgment . . . taken against him . . . through his . . . mistake, inadvertence, surprise or excusable neglect. Application for such relief . . . must be made within a reasonable time, in no case exceeding six months, after such judgment, . . ."

from paragraph 10 of the interlocutory judgment of dissolution of marriage. The interlocutory judgment was entered November 15, 1978. As evidenced by Sidney's appeal from other portions of that judgment, it was appealable. (Code Civ. Proc., § 904.1, subd. (j).) Interlocutory decrees of dissolution are res judicata as to all questions determined therein, including the property rights of the parties. (Kulchar v. Kulchar (1969) 1 Cal.3d 467, 470; In re Marriage of Guardino (1979) 95 Cal. App.3d 77, 87, hg. den.) "The mere fact that the final decree restated and reaffirmed the previous judgment made and entered at the time of the trial and included in the interlocutory judgment conferred no right of appeal as to matters involved and finally determined by the original interlocutory judgment" (Huneke v. Huneke (1909) 12 Cal.App. 199, 204), for "[t]he law of this state does not allow, on an appeal from a judgment, a review of any decision or order

from which an appeal might . . . have been taken" (Woodman v. Ackerman (1967) 249 Cal.App.2d 644, 648).[2] Since Sidney failed to raise the status of his military retirement in his original appeal from the interlocutory judgment of dissolution of marriage, he waived any subsequent right to appeal the issue. We note also that the interlocutory judgment of dissolution was entered November 15, 1978. His motion was filed December 12, 1979. Under section 473, it was not timely filed.

Finally, in denying Sidney's motion, the trial court correctly recognized that at the time the matter was heard, and at the time the parties stipulated, California law

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2. Appellant calls the court's attention to the printed provision of the final judgment form which provides: "Pursuant to Civil Code Section 4506(1). . .a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons." This does not assist him.

was well settled that Sidney's military retirement was subject to division as community property. McCarty vs. McCarty (1981) _____ U.S. _____, [69 L.Ed.2d 589; 101 S.Ct. 2728] may not be given retroactive application in cases where the issue of the community nature of a military retirement pension was adjudicated, and the issue was not timely raised on appeal. (In re Marriage of Fellers (1981) 125 Cal.App.3d 254; In re Marriage of Mahone (1981) 123 Cal.App.3d 17, hg. den.)

We turn then to Sidney's contention that the trial court abused its discretion in failing to terminate or further reduce spousal support below the sum of $400 per month. It is quite clear from the trial court's order and the resulting reduction in spousal support that it fully recognized the change in circumstances which had occurred since August 23, 1978. "It is axiomatic that the trial court has broad discretion with respect to modification of support

orders, and that appellate review of such modifications is limited accordingly. (In re Marriage of Judd (1977) 68 Cal.App.3d 515, 524 . . . .)" (Verner v. Verner (1978) 77 Cal.App.3d 718, 726-727.) Sidney has failed to demonstrate an abuse of discretion.

The order is affirmed.

White, P. J.

We concur:

Feinberg, J.

Barry-Deal, J.

1 Civil 49751

APPENDIX B

Document 1: Interlocutory Judgment (entered November 15, 1978)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re the marriage of	Case No.
Petitioner: BARBARA LEE YATEMAN	MDR 10439
and	INTERLOCUTORY JUDGEMENT OF
Respondent: SIDNEY HERSH YATEMAN	DISSOLUTION OF MARRIAGE

This proceeding was heard on August 24, 1978 before the Honorable E. J. Leach.

The court acquired jurisdiction of the respondent on March 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this

or the final judgment until a final disposition is made of each such matter.

The Court further orders both parties to carry out the following terms and provisions of this Interlocutory Judgment:

1. Physical custody of daughter JENNIFER YATEMAN, born March 5, 1962, is awarded respondent with reasonable rights of visitation to petitioner.

2. Physical custody of daughter JILL YATEMAN, born March 8, 1964, is awarded petitioner with reasonable rights of visitation to respondent.

3. Respondent receives the Mercury station wagon as sole property while petitioner receives the Volkswagon sedan and both parties agree the value is approximately equal.

4. The real property located in Wilton, Connecticut, shall be placed on the market and sold with the proceeds divided equally between respondent and petitioner. Respondent shall continue to make al[illegible]tax

payments thereon and shall receive credit on such payments at time of sale.

5. Respondent shall maintain a minimum of $10,000.00 life insurance with each daughter as beneficiary until each daughter reaches the age of majority.

6. Each party will pay their own attorney's fees.

7. Respondent shall pay to petitioner child support in the sume of $200.00 per month, beginning September 1, 1978 and payable on the first day of each month until daughter JILL reaches the age of eighteen (18) or is sooner emancipated or deceased.

8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon the death of either party or remarriage of petitioner.

9. The community property home located at 1031 Parkway Drive, Pebble Beach, California, is valued at fair market value of $140,000.00 against which exists encumbrances of $53,002.46. The equity is, therefore, $86,997.54. Respondent shall retain the home as his sole and separate property and pay petitioner one-half (1/2) the equity, i.e. the sum of $43,498.77.

10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued

jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences.

11. Household goods, furnishings, jewelry and all community property, personal property remaining in possession of respondent shall be appraised and divided equally. The court shall retain jurisdiction over this matter.

12. Respondent shall continue to reside in a $140,000.00 home and send daughter JENNIFER to the private school, Robert Louis Stevenson.

13. The outstanding cash value of insurance policies shall be determined as soon as possible and respondent shall pay one-half (1/2) of said cash value to petitioner.

14. Both parties are restrained from being in and about the residence of the other except upon reasonable notice for visitation purposes and with permission. Telephone communications with the respective daughters is limited to the hours of 8:00 a.m. and

8:00 p.m.

Any issue left unresolved in this Order shall remain within the jurisdiction of the court.

E. J. Leach
JUDGE OF THE SUPERIOR COURT

Dated: 11/15/78

Document 2: Final Judgment
(entered June 13, 1979)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re the marriage of	Case No.
Petitioner: BARBARA LEE YATEMAN	MDR 10439
and	FINAL JUDGMENT
Respondent: SIDNEY HERSH YATEMAN	(MARRIAGE) OF DISSOLUTION

The court acquired jurisdiction of the respondent on March 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that:

( ) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

( ) Pursuant to ( ) Civil Code Section 4400, ( ) Civil Code Section 4401, or ( ) Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

(X) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated: June 12, 1979

RALPH M. DRUMMOND
JUDGE OF THE SUPERIOR COURT

APPENDIX C

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

In re the marriage Barbara Lee and Sidney Hersh Yateman	
BARBARA LEE YATEMAN, Respondent, vs. SIDNEY HERSH YATEMAN, Appellant.	1 Civil 46564 (Sup. Ct. No. MDR 10439)

The husband appeals from that portion of an interlocutory judgment of dissolution of marriage which awarded spousal support to the wife of $550.00 per month and child support of $200.00 per month. We have concluded that, on the record before us, the

trial court did not abuse its discretion, or fail to find on material issues of fact.[1]

(1) Did the Trial Court Abuse Its Discretion by Awarding $550.00 Per Month Spousal Support and $200.00 Per Month Child Support?

In setting the amount of support, a wide discretion is vested in the trial court. A finding of abuse of that discretion will be made only when, "after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances." (In re Marriage of Roesch (1978) 83 Cal. App.3d 96, 102; In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 114.)

The husband contends that the court

1. On appeal, the husband has alleged that the wife's circumstances have significantly changed since the entry of the support order as part of the interlocutory judgment of dissolution. None of those changes are contained in the record of appeal, however. More fundamentally, events occurring after the entry of the support order are not grounds for reversal of the order on appeal. If one party's circumstances have changed, the other has a remedy in the trial court.

that the court abused its discretion by failing to consider the following factors in determining the proper amount of spousal support: (1) the wife's ability to find present employment; (2) the husband's needs and living expenses; (3) the nature and extent of the community property awarded to the wife; (4) the wife's needs and living expenses; and (5) "Other factors," by which the husband means primarily the relationship of the wife to the man with whom she and her daughters lived during the period of the separation.

It appears from the record that the trial court did consider these factors. In this case, as the trial court observed, it was evident that adjustments would have to be made by both parties if they were to manage living apart. It is true that, according to the parties' financial declarations, the husband would not be able to meet the spousal and child support orders with his current income and expenses.

However, neither was the wife able to live without spousal and child support, at least as of the time of the trial. The disagreement over the proper amount of support stems from the fact that there simply was not enough money to support two separate households without a substantial revision of both parties' standard of living.

Wife's ability to work. The wife had not worked during the course of this 19-year marriage, except during the two years prior to separation, when she was employed first as a secretary and then in a bakery. She indicated at trial that she would soon be attending college to obtain a degree and was fairly certain of obtaining part-time employment under a work-study program. The husband argues that she is presently able to secure other employment in addition to college and her work-study program, and/or that she should have accepted a job as a salesperson or in another capacity which

would be more remunerative immediately. As the trial court observed, the long-range prospects for the wife would be far better if she followed her current plans. The record does not support appellant's contention that the wife is able but simply unwilling to accept other employment right now.

Husband's needs and living expenses. It is true that the spousal support order is not within the husband's present ability to pay according to his financial declaration. However, the wife testified that she had no other source of income at the time of the trial, and that testimony was not disproved. Although she received $43,000 from the husband as payment for her interest in the community residence, the interest from investing that money would be only about $250.00 per month. There is no other evidence before this court as to the wife's present earnings or other sources of support. Clearly, then, the support order

was necessary to enable the wife to meet her monthly expenses.

Nature of community property awarded to wife. The major community asset was the family residence. The residence was awarded to the husband with an equalizing payment to the wife for her interest in the property. The parties effected an equal division of property; the wife did not receive a disproportionate share and the cash payment from the husband was not a disguised support payment which should offset his support obligation. The judge apparently did take into account the monthly interest which the wife will earn from investment of the money.

The wife's needs and living expenses were obviously taken into account. There was no showing that her expenses were excessive.

Other sources of support. The husband contended at trial that the wife was supported by the man with whom she was living during the period of the separation.

However, the wife contradicted this testimony. While the wife admitted that she had accepted gifts from the man, she denied that she had free access to his bank accounts, that she knew that she was going to inherit his estate, or that she would continue living in his house rent-free. As of the time of the trial, she had rented a house for herself and her daughter in Carmel; any money she borrowed from him was done with a written promise to repay. The husband did not produce evidence other than his own testimony regarding the amount of such support given to the wife. Further, such support, if any, was purely volitional upon the part of the donor and thus the trial court could properly disregard it in fixing the amount specified in the original support order.

(2) Did the Court Fail To Find on Material Issues of Fact?

The husband also attacks the judgment in the trial court on the grounds that the

trial court failed to find on the facts pertaining to the wife's earning capacity, and on the amount of money she could derive from investment of the $43,000 received by her from the husband for her interest in the community residence.

The judge signed the Proposed Findings of Fact prepared by the wife. The first finding stated: "1. Respondent's [husband's] gross monthly income is at least $2,502.43. Withheld income tax and social security will be approximately $592.74. Petitioner [wife] presently has a promise of employment and will soon be able to assist in her own support. In the interim other work is available to her, and she has some income which can be derived from funds in her possession." This finding seems to take into account the income which could be derived from investment of the $43,000, since there was no indication that she had any other funds. Thus, appellant's request for a special finding on that issue was in

essence repetitious of a finding the court had already made. The spousal support and child support order gave the wife $750.00 per month to meet expenses of approximately $1,000. Obviously the judge was taking into account the proceeds of the $43,000 investment.

The husband requested special findings with regard to how much the wife could earn were she presently employed, how much she had earned previously, and a finding that she "is presently employable and has not sought nor been interested in employment."

The husband's objections are unfounded. The wife made a choice between finding immediate, low-paying employment and returning to school to obtain a degree which would enable her to become entirely self-supporting. She intended, furthermore, to engage in a work-study program which would give her an unascertained amount of monthly income and at the same time provide her with training in her field of study. Any

findings with regard to her past earnings would have been irrelevant; and any made as to her future earning capacity, entirely speculative. A finding that she had not sought and was uninterested in finding employment would have been directly contradictory to the wife's testimony on this subject which was itself uncontradicted.

The judgment is affirmed.

Feinberg, J.

I concur:

White, P.J.

I concur in the judgment.

Scott, J.

APPENDIX D

[The order of the California Supreme Court denying Appellant's petition for a hearing appears in the court's minutes for July 22, 1982. Those minutes are reprinted in the advance sheets of "California Official Reports", 1982, number 22, Minutes, at P.5 (August 17, 1982). The minutes will not appear in the bound version, known as "California Reports" 3d.]

MINUTES

SUPREME COURT [OF CALIFORNIA]

San Francisco, July 22, 1982

. . . . .

(1 Civ. 49751 Div. 4)--In re the Marriage of YATEMAN, YATEMAN v. YATEMAN. Appellant's petition for hearing denied.

APPENDIX E

SIDNEY H. YATEMAN
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In Propria Persona

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re the marriage of BARBARA LEE YATEMAN, Petitioner & Appellee, vs. SIDNEY HERSH YATEMAN, Respondent & Appellant.	1/CIV. 49751

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Sidney Hersh Yateman, the Respondent and Appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in this action on

May 12, 1982, which affirmed the Superior Court's judgment dissolving the parties' marriage.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

SIDNEY H. YATEMAN
In Propria Persona

APPENDIX F

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

California Civil Code §4800(a):

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-

community property of the parties in an equitable manner.

Title X, Uniformed Services Former Spouses' Protection Act (H5957 & S1814).

§1408(c)(1) "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.